82-1635

No.

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IN THE

Supreme Court of the United States

October Term, 1982

PAUL A. LANIGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did not the court below err in failing to suppress evidence seized as a result of warrantless searches undertaken at the whim and caprice of government inspectors, in the absence of any neutral, pervasive, random inspection program?

2. Did not the court below err in failing to suppress analyses of destroyed evidence?

3. Did not the court below err in failing to conclude that Mr. Lanigan was charged under inapplicable statutes?

4. Did not the court below err in failing to hold that the Clean Water Act and Refuse Act are inapplicable to landfill leachate discharges, especially since there was no evidence whatsoever establishing any adverse impact on any receiving stream?

5. Did not the court below err in erroneously instructing the jury respecting the elements of the Clean Water Act and the Refuse Act liability?

6. Since the reliability of the government expert's methodology was not established, and had never been admitted in any court of law, did not the court below err in failing to exclude the expert's testimony?

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OPINIONS BELOW

There is no Opinion of the panel of the United States Court of Appeals for the Third Circuit affirming the Opinion of the United States District Court for the Eastern District of Pennsylvania. The Judgment Order affirming the Opinion without discussion, was entered on January 7, 1983, and appears in the Appendix at A1.

The Order of the Third Circuit Court of Appeals denying the Petition for Rehearing and Rehearing En Banc was entered on February 3, 1983, and appears in the Appendix at A4.

There are no reported Opinions of the United States District Court for the Eastern District of Pennsylvania.

JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit at A1, was entered on January 7, 1983. On February 3, 1983, the Court denied a Petition for Rehearing and Rehearing En Banc filed by Petitioner herein. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

No person shall . . . be deprived of life, liberty or property without due process of law; . . .

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Resource Conversation Recovery Act
42 U.S.C. § 6901 et seq.

42 U.S.C. § 6928(d). *Criminal penalties.*—Any person who—

(2) knowingly treats, stores, or disposes of any hazardous waste. . . .

(A) without having obtained a permit;

(B) in knowing violation of any material condition or requirement of such permit;

(4) knowingly generates, stores, treats, transports, disposes of, or otherwise handles any hazardous waste (whether such activity took place before or takes place after October 21, 1980) and who knowingly destroys, alters, or conceals any record required to be maintained under regulations promulgated by the Administrator under this subchapter shall, upon conviction, be subject to a fine . . . , or to imprisonment. . . .

Refuse Act

33 U.S.C. § 401 et seq.

33 U.S.C. § 407. *Deposit of refuse in navigable waters generally*

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; . . .

Clean Water Act

33 U.S.C. § 1251 et seq.

33 U.S.C. § 1319(c)

(1) Any person who willfully or negligently violates sections 1311, 1312, 1316, 1317, or 1318 of this title, or any permit issued under section 1342 of this title by the Administrator or by a State or in a permit issued under section 1344 of this title by a State, shall be punished by a fine . . . , or by imprisonment . . . .

STATEMENT OF THE CASE

Shortly after World War II, Howard Moyer began using land which he owned as a site for open dumping of municipal and private refuse. The land, known as Moyer's Mountain, was located on rock formations which sloped rapidly down on the South and West sides to two waterways, Eagle Stream and Skippack Creek. The land between Moyer's Mountain and the Skippack was owned by the Commonwealth of Pennsylvania. That between Moyer's Mountain and Eagle Stream was owned by another individual, not here involved. The landfill site was lined with underground streams which surfaced on the landfill face. These streams, subsequently covered by an average of sixty feet of trash deposited on the landfill, establish the futility of any attempt to wholly control leachate, the generic name for the end product of water percolating through anything, in this case materials deposited on a landfill.

In the late 1960's, on the creation of the Division of Environment Resources of the Commonwealth of Pennsylvania and the passage of the State's Solid Waste Management Act, DER approached all landfill owners, including Moyer, to work out schedules to bring landfills into compliance with DER regulations. Pursuant to such negotiations, Moyer entered into a consent decree on May 16,

1972. That agreement required Moyer to build an interim and final leachate control system approved by DER. In 1972, Mr. Lanigan was hired by Moyer to construct the interim system. Lacking monies to pay Mr. Lanigan for services rendered, in 1974 Moyer offered him twenty-five (25%) percent interest in a corporation, Moyer's Landfill, Inc., to own the landfill operation, the land beneath remaining owned by Moyer. The agreement marks Mr. Lanigan's involvement with the operation of the landfill.

Ronald Landon, a hydrogeologist working extensively with leachate generation and control in landfills, and who was accepted without an objection as an expert, testified that he was retained by an engineering firm to design an interim and final collection system. Given the substantial site limitations, Landon proposed the construction of a "state of the art" leachate interceptor trench excavated along the toe of the landfill. The trench, approximately 1000 feet long, was designed to collect most, but not all, of the leachate. The trench, constructed with a uniform gradiant to provide for gravity drainage, was hacked by Mr. Lanigan out of competent bedrock, from several feet to twenty or more feet deep.

Mr. Landon also testified, without contradiction, that the leachate seeps occurring on land adjacent to the landfill in 1978-1980, which seeps formed the gravamen of the charges lodged, were of leachate generated long prior to 1978, having been stored in rock crevices underlying the landfill and slowly moving through such rocks towards the waterways. Mr. Landon, moreover, testified that the source of the seeps was likely to be Troop Farm, a 100 odd acre plot next to the landfill on which a piggery had existed, municipal trash and sludge been deposited, and chemical fertilizers placed. Further, Mr. Landon testified that regardless of the source of the leachate, had landfilling stopped in 1972, and the landfill been fully capped at the time the Consent Order was signed by Moyer, the seeps and oozes on the adjacent property would still be occurring in 1978-1980, and that Mr. Lanigan could have done nothing

to control those seeps. His testimony was echoed by Dr. Edgar Meiser, a geologist working extensively with ground water pollution relating to landfills.

Richard Bodner, a registered professional engineer who brought Mr. Landon to Moyer's in 1972 in connection with the implementation of the Consent Order, also testified, reaffirming the conclusions of Landon and Meiser. Bodner also testified that Mr. Lanigan had neither created nor designed the system, but rather had constructed and installed it; that the system was designed by experts; that the system was designed to intercept as much of the leachate as was possible, but not all leachate; that DER approved the system; that the work Lanigan did in constructing the system was "unbelievable"; and that leachate control at the landfill had dramatically and continually improved from 1971 through 1980.

These three experts, each of whom had been previously retained by the landfill in connection with matters extraneous to the criminal charges lodged against Mr. Lanigan, testified that the leachate problems were attributable to system design, which could not be alleviated, and certainly not to negligence on Mr. Lanigan's part. Furthermore, six witnesses who worked for Moyer's from 1978 through 1980 testified that Lanigan insisted that leachate seepage, leaks and control was their major priority, regardless of their assigned task.

The government's evidence did show that on a precious few days liquid escaped from the vicinity of the landfill. It did not show that any such escape was the result of negligence of Mr. Lanigan, nor could it have been. Moreover, the government never established that any water near the landfill was adversely affected by receipt of escaping leachate. Dr. John Keenan, a professor of environmental engineering at the University of Pennsylvania, testified that on comparing "storet" data for Skippack Creek, a waterway several hundred feet below Moyer's, for the periods 1950-1978, and 1978-1980 (the periods for which EPA maintained and established such data), both imme-

diately upstream and downstream from Moyer's, obtained by and for the EPA at independent sampling stations, there was no evidence whatsoever that the landfill had any adverse impact on the Skippack. Indeed, no samples of Skippack water allegedly altered by leachate were ever attempted to be introduced into evidence.

The government's case consisted of lay persons claiming they saw leachate escaping from Moyer's or entering the Skippack on precious few dates over a three year period. Assuming that their testimony was credible, these persons neither established negligence on the part of Mr. Lanigan, nor any measurable impact on receiving streams.

For the former proposition, the government relied upon Gary Brown, a technical consultant hired for the prosecution of this case, who never saw the landfill until months after Mr. Lanigan had involuntarily been evicted from it by Moyer.[1] Brown testified based on a "water balance method analysis", which analysis had never been accepted as valid in any court of law, and which required Brown to assume conditions on the landfill about its operations which were affirmatively incorrect and material.[2]

1. The non-payment of rent from Moyer's Landfill, Inc. to Moyer, as owner of the ground on which the landfill sat, was the cause of the eviction. Mr. Lanigan continually sparred with Moyer over the latter's refusal to make corporate monies available for use on the landfill to fund leachate control measures in place and planned.

2. Brown's conclusions as to the amount of water the landfill could absorb were premised on the volume of trash, each cubic yard of which holds 50 gallons of water on the 4 acre new landfill which he assumed was thirty-five feet deep; the absence of recirculation; and the absence of a closed system precluding rain water from mixing with leachate. In fact, the evidence disclosed that the depth of fill averaged 60-100 feet; that recirculation did occur on the 40 acre old landfill; and that the system was closed. Brown even admitted that his assumptions were incorrect. The significance of the erroneous assumptions is critical and prejudicial. For example, Brown found a saturation capacity—the amount of liquid which the landfill could hold—of only 10.4 million gallons, believing that recycling only

Based on his erroneous assumptions, Brown found that leachate generated which could not be absorbed by the landfill was 16.2 million gallons.

Brown also testified, however, that by correcting his erroneous assumptions, the amount of excess leachate generated was 3.8 million gallons. Since Brown testified that ten (10%) percent of the saturation capacity of the landfill, which he computed to be 115 million gallons, could be used to store leachate, then the landfill could absorb 11.5 million gallons of what the expert termed excess leachate.[3] Since only 3.8 million gallons were excess, according to Brown, there was no excess leachate.

Not only did Brown testify to facts disproving the claimed existence of excess leachate, but also Dr. John Keenan similarly testified. Taking all Brown's stated assumptions save one, altered in turn to conform to the facts concerning the actual operation of the leachate control system at Moyer's, Dr. Keenan testified that: (a) since leachate was recycled to the old landfill, the amount of excess leachate generated was zero; or (b) with 500 to 700 tons per day of trash deposited on the old landfill (which figure was derived from DER inspection reports introduced into evidence) the amount of excess leachate generated was zero.

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2. (Cont'd.)

occurred on the 4 acre 35 feet deep new landfill area. Had he known that the recycling was occurring on the old fill area, which he claimed was 40 feet deep and 39 acres, then Brown testified to an additional saturation capacity of over 115 million gallons. Since Brown had concluded that 16.2 million gallons of leachate were generated over what the landfill could absorb, without considering the additional saturation capacity, there obviously was no excess leachate generated.

3. Intriguingly, in his report, Mr. Brown calculated that 100% of the saturation capacity could be used to store leachate. Only when his calculations, corrected for his factual errors, disclosed no excess leachate did he mention his 10% figure. The figure is unsupported by any literature or trial evidence.

Moyer's had an agreement with Bridgeport Sewer Authority permitting it to dispose of up to 50,000 gallons of leachate per week, which agreement was claimed to be a part of Moyer's permit conditions. The "negligence" of Mr. Lanigan was essentially claimed to be his failure to haul leachate from the landfill, thereby permitting excess leachate to build up beyond the ability of the landfill to absorb it. However, Dr. Keenan's testimony, and that of Gary Brown, using Mr. Brown's uncorrected assumptions, established that removal of 50,000 gallons of leachate per week would have reduced the uncorrected excess leachate figure from 16.2 million gallons to only 10.5 million gallons, so that leachate hauling would have had no measureable impact on discharges escaping from the landfill. Similarly, using Mr. Brown's corrected assumptions, and/or Dr. Keenan's calculations based on Mr. Brown's assumptions, there was no excess leachate generated. Therefore, it could not be negligent for Mr. Lanigan to fail to haul the leachate to Bridgeport.

In an attempt to establish impact on receiving streams, the government relied on leachate samples obtained from or around collection basins and storage tanks located on Moyer's property and on state property between the landfill and Skippack Creek. No such samples were taken of the Skippack itself. The government contended that these samples contained high levels of pollutants which must somehow have had an adverse impact upon the Skippack. In addition, however, they should have been excluded as a matter of law for constitutional infirmities.

The samples obtained from the collection basins and containment vessels over a three year period resulted from warrantless searches and seizures of Moyer's property by DER and EPA personnel. All such personnel testified, without contradiction, that: (a) no search or administrative warrant was ever obtained or sought for any such entry; (b) no consideration was ever given as to whether to seek such warrant; (c) Mr. Lanigan was never advised by anyone that the sample results could be used against

him or the landfill for any civil or criminal purpose whatsoever; (d) Mr. Lanigan was never advised that escapes of leachate to receiving streams violated even civil, much less criminal, statutes; (e) that on many occasions when DER/EPA personnel sought access to Moyer's property, Mr. Lanigan was not present so that no consent was obtained or that were he present, no attempt was made to contact him; and (f) even after a federal grand jury investigation into leachate discharges had commenced, warrantless entries for the purpose of obtaining samples continued, and Mr. Lanigan was not even approached for his "consent" to such search.

The evidence also disclosed the total absence of any routine, periodic, administrative inspection program undertaken by either DER or EPA. Robert Orwan, Chief of Compliance Section of DER, testified that although DER has policies and procedures for obtaining consents and conducting warrantless searches, and that the policies refer to a "consent to inspection" form, Orwan had never seen such form. Moreover, there is no requirement—statutory, regulatory or internal—which purports to establish how often landfills are to be inspected, or which landfills should be inspected. Thus, there is no routine administrative inspection plan. Similarly, the record was wholly devoid of any evidence from which the existence of an EPA routine administrative inspection plan could even be inferred. Indeed, each EPA entry onto landfill property was affirmatively triggered by either a specific complaint and follow up or a desire to obtain information for the grand jury. Thus, the sine qua non of a valid administrative warrantless search—routine, neutral indiscriminate administrative plan—was wholly absent.

More perniciously, the government destroyed all samples of leachate obtained from the warrantless searches and seizures. The EPA samples, the analyses of which were introduced at trial, had been destroyed in October 1981, the same month as the indictment was returned. No samples were kept in sufficient quantity to permit one

to disprove or verify the analyses of samples seized, and Mr. Lanigan was never told that samples could be "split" so that he could have such samples independently tested and verified. Moreover, the standard deviation in analyses of samples may range from 30-40%.[4] Given the obvious significant range of expected error, the failure to provide samples to Mr. Lanigan for testing was extremely prejudicial.

In response to this prejudice, the government argued that even had the samples been retained, their analysis after "holding times"[5] had expired would not permit an accurate measure of the amount of each parameter tested for. This response, of course, misses the mark.

Given the EPA acknowledged standard deviations, Dr. Keenan testified that analysis beyond the holding times would be most crucial in order to help verify the original analyses. Although Dr. Keenan agreed that such analyses ought not provide an accurate measure of the *precise* amount of each component element, it would disclose an accurate determination of the *presence* of such element. Thus, the destruction of this evidence precluded Mr. Lanigan from ever verifying the quality of the samples.

The affirmative evil of the introduction of Brown's testimony was magnified by the Court's instructions. In connection with the Clean Water Act charges, the Court instructed that the standard of criminal law to which Mr. Lanigan would be held accountable was the ordinary due-

4. The EPA "Methods Manual"—Method for Chemical Analysis of Water Wastes—the "Bible" for the field, notes the following standard deviations: for chromium, given a known sample of 370 micrograms per liter, the standard deviation is 105 micrograms per liter; for iron, given a known sample of 350 micrograms per liter, the standard deviation is 131 micrograms per liter.

5. Holding time is defined as that period within which a properly preserved sample may be tested for a specific "parameter" (component element) and give reasonably accurate measurements of both the presence and amount of such parameter.

care standard of civil negligence, not gross negligence.[6] Respecting the Refuse Act, the Court instructed that criminal convictions could ensue "without the necessity of proving that he committed any act . . . knowingly, wilfully, or even negligently" if the jury found that Mr. Lanigan was a responsible corporate official. As discussed *infra*, both charges are erroneous.[7]

Trial commenced on February 8, 1982. On March 5, 1982, after two days of deliberations, the jury returned its verdict. Of the 34 counts remaining from a 37 count indictment, the jury acquitted Mr. Lanigan on counts 1-15, each relating to claimed discharges in 1978, and convicted him of 15 counts of violations representing discharges occurring on seven days in 1980. Mr. Lanigan was also acquitted on four counts of 1980 violations, two of which had been alleged to have occurred on each of two dates for which the jury returned guilty verdicts.

Notice of appeal was timely filed following the imposition of a sentence of one year's incarceration and a fine, on May 14, 1982. On January 7, 1983, the Third Circuit affirmed per curiam the District Court's determinations, without discussion. On February 3, 1983, the Third Circuit denied petitioner's "Petition for Rehearing and Rehearing En Banc." The Third Circuit has stayed issuance of its mandate pending disposition by this court of the instant Petition for a Writ of Certiorari.

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6. At post trial motions, the court acknowledged that such error, if error, is plain error requiring the granting of a new trial, even if not objected to by counsel. Neither the government nor the court seriously contended that wilfulness was at issue.

7. The court also charged that no actual harm or damage to the receiving stream need be shown to make out Clean Water or Refuse Act violations. This, too, is erroneous. See IV, *infra*.

REASONS FOR GRANTING THE WRIT

I. The Repeated Warrantless Searches of the Landfill Violated Lanigan's Fourth Amendment Rights

A. The Searches Here Conducted Violate the Fourth Amendment Due to the Absence of a Warrant or an Equivalent Guarantee of Reasonableness

The right to be free from governmental intrusion is guaranteed by the Fourth Amendment.

The challenged searches are constitutionally defective in several respects. First, they were not based on a warrant. Second, they were not part of a regularized neutral administrative inspection program, the sine qua non of reasonableness where no warrant is obtained. Third, the statutes purporting to establish authority for the warrantless searches are wholly devoid of criteria from which a regularized, routine administrative inspection plan may be created, so that no congressional intent to deem warrantless searches reasonable may be inferred.

B. The Reasonableness Requirement Adheres Administrative Searches

The reasonableness requirement adheres to administrative searches not randomly undertaken for general purposes. In *Camara v. Municipal Court,* 387 U.S. 523 (1957), the Court held that administrative inspection programs violate the Fourth Amendment unless predicated upon a validly issued warrant, supported by probable cause. *Camara* drew a bright line between two separate and distinct types of searches, each predicated upon a different standard of "reasonableness". Where the government focuses on a specific offense, possessing specific evidence of an existing violation, the requisite "probable cause" is the traditional, criminal law standard. Where the government does not focus on a specific individual for a specific offense, but seeks to conduct an administrative search pursuant to a routine, periodic inspection program, which

search is essential to an overriding public interest, a different situation is presented.

Reasoning that such inspections "are neither personal in nature nor aimed at the discovery of evidence of crime", and are based on important civil government purposes, *Camara* held that although a lesser standard of probable cause was permitted, nonetheless a warrant based upon some showing of probable cause was required. *Accord, See v. City of Seattle,* 387 U.S. 541 (1967).

Marshall v. Barlow's Inc., 436 U.S. 307 (1978), adhered to the traditional probable cause standard, absent a generalized, indiscriminate regulatory inspection program, and required a showing of relaxed probable cause for random administrative searches:

> "*For purposes of an administrative search such as this,* probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to particular [establishment].' *Camara v. Municipal Court,* 387 U.S. 523, 538 (1967)." *Barlow's, supra,* U.S. at 320-21.

Thus, *Barlow's* requires a showing that a specific business was chosen for inspection pursuant to a general administrative plan, and not for belief of a specific violation predicated on a specific complaint. As in *Camara,* the generalized administration plan is equivalent to reasonableness under the Fourth Amendment, and the overriding governmental interest supplies the probable cause.

In *Donovan v. Dewey,* 101 S.Ct. 2534 (1981), the court held valid a warrantless search of mining facilities based upon an explicit and statutorily defined regulatory search scheme, opining that the comprehensive nature of the random and neutral regulatory criteria themselves, specially tailored to fit the unusual requirements of mine safety, comported with the Constitution:

> "[T]he only real issue before us is whether the statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant. We believe that it does. Unlike the statute at issue in *Barlow's*, the Mine Safety and Health Act applies to industrial activity with a notorious history of serious accidents and unhealthful working conditions. The Act is specifically tailored to address those concerns, and the regulation of mines it imposes is sufficiently pervasive and defined. . . . Thus, rather than leaving the frequency and purpose of inspections to the unchecked discretion of government officers, the Act establishes a predictable and guided federal regulatory presence." *Donovan, supra*, 101 S.Ct. at 2540-41.

Here, neither statute nor regulation provides such routine plan nor does conduct of EPA/DER suggest the existence of such plan. Indeed, it places "unbridled discretion on executive and administrative officers".[8] Moreover, there is no history of serious accidents, unhealthful working conditions, or allegations of hazardous waste storage or leakage.

Cases interpreting *Donovan* have followed these distinctions in invalidating warrantless searches. *Bionic Auto Parts and Sales, Inc. v. Fahner*, 518 F.Supp. 582 (N.D. Ill. 1981). Further support of this conclusion is suggested by *Dow Chemical Co. v. United States*, 536 F.Supp. 1355 (E.D. Mich. 1982), suppressing warrantless EPA aerial photographs of a chemical manufacturing plant for want of a valid administrative inspection.

8. The Clean Water Act merely parrots language found infirm in Barlow's, permitting the administrator a "right of entry" exercisable at "reasonable times" to copy records and sample effluents, 33 U.S.C. § 1318(a)(B)(i) and (ii). The Refuse Act does not purport to permit warrantless entries for enforcement purposes. Even the RCRA access provisions, had they been applicable, mirror the vague, standardless language of the Clean Water Act. 42 U.S.C. § 6927(a).

Reading *Donovan* to hold that the validity of the search centered upon the presence of "sufficiently comprehensive and defined criteria", the court analyzed EPA's statute and found them wanting upon analogizing EPA's rights under the Clean Air Act to the Clean Water Act.

Applying these principles to the case at bar, it is crystal clear that some reasonableness standard applies here. Lacking any, by warrant, statute, regulation or practice, the searches and seizures are necessarily infirm so that each search is unconstitutional.

II. The Introduction of Analyses of Destroyed Leachate Samples Violated Lanigan's Rights to Due Process and Effective Assistance of Counsel

A. Destruction of Evidence Is Suppression of Evidence, Violating the Duty to Preserve

In *Brady v. State of Maryland*, 373 U.S. 83, 87 (1963), the court held that suppression of evidence favorable to the accused violates a defendant's constitutional right to due process of law, regardless of the prosecution's intent. *Brady* was further refined in *United States v. Agurs*, 427 U.S. 97 (1976), wherein the court applied the *Brady* rule to pretrial request for specific evidence not honored, holding that a failure to respond to a specific relevant request is material so long as such suppressed evidence reasonably might affect the jury verdict.

Here, petitioner had specifically requested that he be provided with portions of all samples of "leachate" obtained on or around Moyer's Landfill, Inc., and upon which the government relied for trial. The government replied that all samples had been destroyed. Under *Brady* and *Agurs*, the DER and EPA samples were suppressed, as if the government had failed to disclose their existence, because Mr. Lanigan was deprived of any use of the samples. *Bryant v. United States*, 439 F.2d 642 (D.C. Cir. 1971).

Since the samples suppressed by violation of the duty to preserve were the sole vehicle through which Mr. Lanigan could dispel the motion that landfill discharges were

pollutants, or, establish an alternate source for claimed landfill discharges, the samples were clearly relevant and material; therefore, intent of the prosecution in failing to produce the evidence is of no moment to the constitutional issue posed. At the very least, the test results themselves should have been suppressed.

B. Defendant Must Have the Opportunity to Have His Expert Examine the Items Upon Which the Government's Expert Testimony Is Based

In *Miller v. Pate*, 386 U.S. 1 (1967), petitioner had been charged with the murder and brutal sex assault of an eight (8) year old girl. In the absence of eye-witnesses, the state relied upon a man's underwear shorts covered with large, dark, reddish-brown stains. A government chemist testified that the stains were blood of the grouping of the victim, and not of the petitioner. The state contended that the petitioner had worn the blood-stained shorts when committing the murder.

Petitioner had the shorts examined by his expert, a chemical microanalyst, who testified that the stains were paint, finding not a trace of human blood. *Pate*, reversing due to prosecutorial misconduct, highlights the importance of providing a defendant with the physical evidence to be used against him because the results of government testing will often be inadequate and inaccurate.

In *Barnard v. Henderson*, 514 F.2d 744 (5th Cir. 1975), the failure to grant defendant's pretrial motion to have a murder weapon and bullet examined by defendant's expert was deemed prejudicial, requiring reversal. The state relied upon *Brady* for the failure to *produce*, stating that there was no showing that such examination of the murder weapon and bullet would be favorable to Barnard. The court dismissed this assertion blithely, stating "due process cannot be sidestepped by such a facile distinction". See, *United States v. Butler*, 499 F.2d 1006, 1008 (D.C. Cir. 1974); *White v. Maggio*, 556 F.2d 1352, 1356 (5th Cir. 1977); *Government of Virgin Islands v. Testamark*, 570 F.2d 1162, 1165-66 (3d Cir. 1978).

Testamark was prepared to overturn a conviction but for the explicit testimony of the defendant, which undercut the possibility of his inebriation:

> "In view of this direct testimony, even had the jury been confronted with a high blood alcohol reading, it could not reasonably retain a suspicion that the alcohol had rendered Testamark incapable of forming an intent to rape. Thus, even if the blood test contained all that the defendant suggests that it might, there is no reasonable possibility that the preservation of the blood sample would have affected the outcome of this case. We therefore conclude that the failure to preserve the blood sample was harmless beyond a reasonable doubt." *Testamark, supra,* 570 F.2d at 1167.

The Third Circuit noted that its holding should be "narrowly circumscribed", and that, were the police to prove neglectful in regularly dealing with blood samples or other failures to preserve evidence, "prophylactic sanctions" might be imposed.

Where, as here, the failure to preserve evidence is part of an ongoing practice of "errant conduct", prophylactic sanctions are called for. *Testamark, supra,* 570 F.2d at 1168, n.15. At the very least, since the failure to preserve the sampling is by no stretch of the imagination "harmless beyond a reasonable doubt", the analyses should have been suppressed. Indeed, that was the *Testamark* result. Even though Testamark could not introduce a blood test to show he was intoxicated, the government could not introduce a blood test to show he was sober. Mr. Lanigan deserved no less.

III. Mr. Lanigan Was Not Charged Under the Sole Statute Governing Discharges From Landfills

A. The Charges Were Based on Inapplicable Statutes

As set forth above, the convictions obtained resulted from discharges of landfill leachate alleged to have violated either the Refuse Act or the Clean Water Act, or both.

The Refuse Act, a statute of almost unlimited sweep, makes it a crime to discharge "any refuse matter of any kind or description whatever . . . into any navigable waters of the United States". 33 U.S.C. §§ 407, 411. The Act has never before been judicially determined to extend to a landfill, nor does its language lend itself to such interpretation.

The Clean Water Act, another statute of broad expanse, provides that any person, who willfully or negligently discharges any pollutant from a point source into navigable waters in violation of a permit may have committed an offense. The exhaustive list of categories of point sources from which pollutants may be discharged, omits landfills.

The absence of Refuse or Clean Water Act prosecutions of landfills is not surprising. Since 1965, Congress has specifically become immersed with the issues surrounding landfills and solid waste disposal. In 1965, Congress adopted the Solid Waste Disposal Act, Pub. L. No. 89-272, and five years later the Resource Recovery Act, Pub. L. No. 91-512. These acts, passed *prior* to the Clean Water Act and its amendments have been superseded by the comprehensive Resource Conversation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, passed in 1976.

The RCRA is the act dealing solely with issues surrounding the disposal of solid wastes. As is reflected in the congressional findings of fact and objectives set forth within the act[9] solid waste disposal is the sole subject covered by the statute, whether such disposal occurs in an open dump [42 U.S.C. § 6903(14)] or sanitary landfill [42 U.S.C. § 6903(26)].

That the RCRA here governs is further manifested by the definition of solid waste:

> "The term 'solid waste' means any garbage, refuse, . . . and other discarded material, . . ." 42 U.S.C. § 6903(27).

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9. See, 42 U.S.C. § 6901(b)(1)-(6); 42 U.S.C. § 6902(1), (3), (4), and (5).

The discharges of leachate for which Mr. Lanigan was tried and convicted are in fact governed by the RCRA:

> "The term disposal means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on *any land or water* so that such solid waste or hazardous waste *or any constituent thereof* may enter the environment or be emitted into the air *or discharged into any water,* including ground water." 42 U.S.C. § 6903(3).

Although the open dumping of solid waste is prohibited [42 U.S.C. § 6945(a)] the RCRA does not make criminal even the open dumping of solid non-hazardous wastes. Thus, Congress has clearly stated that, in connection with discharges from landfills, it is only the discharges of hazardous wastes which may provide a basis for the institution of criminal process.[10] Since no hazard-

10. Indeed, even were the Refuse or Clean Water Acts somehow deemed applicable to the discharges of elements of solid waste from a landfill, despite the absence of any express provisions therein; the RCRA takes precedence, 42 U.S.C. § 6905(b). Recourse to the legislative history of the RCRA supports this conclusion. The detailed legislative history of the RCRA, found at 5 USCCAN 6238-6354 (94th Cong. 2d Sess. 1976), clearly sets forth the all encompassing nature of the RCRA as a vehicle for regulating and controlling the disposal of solid wastes in landfills or open dumps as well as Congressional intent to limit the criminal sanctions provided by the act to violations respecting hazardous wastes, seriously affecting human health. Indeed, such intent could not be more clear:

> "This section also provides for criminal penalties for the person who knowingly transports any hazardous waste listed under this title to a facility which does not have a permit issued pursuant to section 305, or disposes of any hazardous waste without a permit under this title, or makes any false statement or representation in any application, label, manifest, record, report or permit filed to comply with this title. *The use of criminal penalties are sufficiently narrow in that they only apply to those*

ous waste discharges were here alleged, no criminal prosecution of petitioner should have occurred.

B. Even Had the RCRA Not Excluded Prosecutions for Conduct Here Alleged to Violate the Refuse and Clean Water Acts, Case Law Would Do So

As set forth above, since the RCRA specifically governs the dumping of solid wastes at landfills, and the resulting impact on both ground waters and navigable waters caused by the discharge of any "constituent element thereof" into the environment, even had Congress remained silent, the statutes claimed violated by the United States must be deemed inapplicable, especially in the context of criminal proceedings. Indeed, any ambiguity concerning the ambit of criminal statutes must be resolved in favor of lenity and against expansive interpretation. *United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971). A more specific criminal statute will necessarily be given precedence over a more general one, regardless of their temporal sequence. *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973). See, *Simpson v. United States*, 435 U.S. 6 (1978); *Busic v. United States*, 100 S.Ct. 1747 (1980).

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10. (Cont'd.)

who knowingly transport hazardous waste to a facility which does not have a permit, the actual disposal of hazardous wastes without a permit, or the falsification of documents, all of which are more serious offenses than the other provisions of the hazardous waste title. The Committee justification for the penalties section is to permit a broad variety of mechanisms so as to stop the illegal disposal of hazardous wastes." 5 USCCAN, 6268-69.

See, *United States v. Burns*, 512 F. Supp. 916, 918 (W.D. Pa. 1981); *Matter of Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981), petit. for rehearing denied, 673 F.2d 47 (2d Cir. 1982); *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 739, 740-41 (5th Cir. 1980).

Here, too, the "rule of lenity" and precedence of a specific statute serve to preclude application of the Refuse and Clean Water Acts to the conduct charged. Therefore, even had the RCRA failed to set forth that it takes precedence over other federal enactments, nonetheless the RCRA, and it alone, would be deemed to apply to the alleged discharges of leachate.

IV. The Clean Water Act and Refuse Act Do Not Proscribe the Discharge of Leachate From a Landfill

The criminal sanctions of the Clean Water Act provide that any person who willfully or negligently discharges any pollutant,[11] from a point source, into navigable waters in violation of the conditions of a permit, has committed a misdemeanor. Since the evidence failed to disclose any pollution of or adverse impact on any waters, all convictions should be overturned. The convictions may stand only if the government proved the discharge into water of chemical wastes or biological materials which altered the integrity of the water. *See, Minnehana Creek Watershed Dist. v. Hoffman*, 597 F.2d 617 (8th Cir. 1979); *SED, Inc. v. City of Dayton*, 519 F.Supp. 979, 989 (S.D. Ohio 1981). It is for that reason that the prohibited point source discharges are any *addition* of a pollutant to navigable water. § 1362(12). Indeed, environmental damage is necessarily the sine qua non of the Clean Water Act, even in civil actions. *E.g., United States v. Alleyne*, 454 F.Supp. 1164, 1170 (S.D.N.Y. 1978) ("Both federal and state administrative agencies have found that the fill

11. Discharge of pollutant means "any addition of any pollutant to navigable waters from any point source" § 1362(12). Pollutant is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials . . . and industrial, municipal and agricultural waste discharged into water", § 1362(6). Pollution means "man made or man induced alteration of the chemical, physical biological or radiological integrity of water". § 1362(19).

placed into the water by defendant is damaging to the environment".).

United States v. Standard Oil Company, 384 U.S. 224 (1966), construing the Refuse Act to preclude discharges of 100 octane aviation gasoline into a river despite no impact on the water's *navigability,* did so because it found that the fuel had a measurable adverse impact on the water:

> "Oil is oil and whether useable or not by industrial standards, it has the same deleterious effect on waterways. In either case, its presence in our rivers and harbors is both a menace to navigation and a pollutant." *Standard Oil, supra,* 384 U.S. at 226.

Similarly, in *United States v. Hamel,* 551 F.2d 107 (6th Cir. 1977), holding that a discharge of hundreds of gallons of gasoline into a lake is an "alteration of the integrity of water" by the addition of a Clean Water Act pollutant, the court presumed measurable adverse impact upon the water. Indeed, consistent with the position here advanced, *Hamel,* on citing to the Clean Water Act definition of "pollutant", referred to the legislative history of the Act which emphasized that the offense was the worsening of water quality through the addition of pollutants. *Hamel, supra,* 551 F.2d at 110 n.2. Thus, deposits into water which have no effect on navigability are prohibited under the Refuse Act only where such deposits affirmatively worsen water quality, *United States v. Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655 (1973). Where, as here, no pollution has been proved, and, indeed, an absence of adverse impact on water established, *PICC* is irrelevant. Therefore, no Clean Water Act convictions may be sustained.[12]

V. The Court Erroneously Instructed That Clean Water Act Liability Could Ensue From Mere Negligence

The Court instructed the jury that the standard of criminal law to which Mr. Lanigan would be held account-

12. The Refuse Act convictions are singularly unsupportable for want of any showing of adverse impact on any waters.

able was ordinary due-care. This is palpably incorrect. Where negligence is not defined, but is rather a statutory alternative to willfulness, the law is clear that gross negligence—the functional equivalent of wilfulness—must adhere. There are no federal cases construing the Clean Water Act precisely on point; however, extant state cases and analogous federal cases mandate this conclusion.

In *State v. Hamilton,* Fla. 388 S.2d 561 (1980), the State appealed from an order holding unconstitutional a section of the Air and Water Pollution Control Act. The statute, which outlawed the "willfully or negligently" causing of pollution, was held unconstitutional for purporting to impose criminal liability upon acts or omissions done absent any bad intent or culpable negligence.

The state conceded the propriety of this position, arguing that the court should read into the statute the word "culpable" to modify negligence, an invitation which the court declined:

> "A statute which penalized the 'negligent treatment of children' was invalidated as being unconstitutionally vague and overbroad. There the constitutional flaw was that the prohibition extended to unintentional conduct which was not generated by culpable negligence. This court distinguished a similar statute which proscribed acts done 'willfully or by *culpable* negligence'. The latter statute was subsequently upheld against the vagueness challenge on the very basis that it did not criminalize simple negligence. *State v. Joyce,* 361 So.2d 406 (Fla. 1978). The State urges us to construe the instant statute as proscribing willful or culpably negligent conduct. This we cannot do. Even where legislation is specifically enacted in the public interest there must be clearly ascertainable standards of guilt by which a citizen may gauge his conduct. [The statute] purports to impose criminal liability upon acts or omissions done entirely without

intent. This is too broad condemnation in this instance and must fail." *Hamilton, supra,* 388 So.2d at 563-64.

In *State v. Winters,* Fla., 346 So.2d 991 (1977), the Supreme Court struck down a statute making it a crime to negligently deprive a child of food, clothing and shelter, holding:

> "Without some statutory standards or guidelines, the legislature has effectively set a net large enough to catch all possible offenders and has left to the courts the power to say who should be detained and who should be set aside." *Winters, supra,* 346 So.2d at 993. See, *State v. Joyce,* Fla., 361 So.2d 406 (1978).

The concept that mere negligence is insufficient to support a Clean Water Act violation is not foreign to the case law. In *United States v. Hudson Farms, Inc.,* 12 E.R.C. 1444 (E.D. Pa. 1978), defendant claimed that the indictment charges of willful or negligent discharges of pollutants were duplicitous. In dismissing this contention, the court reasoned that the intent elements of the crimes were not separate and distinct:

> "The addition of the words 'negligently' and 'wilfully' merely specifies the mode or method by which the proscribed conduct was accomplished.
>
> This analysis is bolstered by the fact that the statute provides but a single penalty for both negligent and wilful discharges, a clear indication that the crimes are not separate and distinct." *Hudson Farms, supra,* 12 E.R.C. at 1446.

The implied insertion of "culpable" before negligence was further developed in *United States v. Oxford Royal Mushroom Products,* 487 F.Supp. 852 (E.D. Pa. 1980). In denying a Motion to Dismiss Clean Water Act charges as duplicitous, the court there relied on *Hudson Farms,* and addressed culpable negligence directly, opining:

> "Finally I note that the mens rea required for negligent conduct and that required for willful conduct cannot be viewed as entirely distinct. It is well settled that intentional conduct may be imputed to a tort feasor *because of grossly negligent conduct.*" *Oxford Royal, supra,* 487 F.Supp. at 857. (emphasis supplied).

That gross or culpable negligence is the proper standard is reenforced by other cases. *Irey v. OSHRC,* 519 F.2d 1200 (3d Cir. 1974) *aff'd. en banc* on other grounds, 519 F.2d 1215 (3d Cir. 1975), *aff'd.* on other grounds, 430 U.S. 442 (1977), vacated a civil penalty assessed under OSHA for a wilful violation, noting the absence of "a knowing, conscious and deliberate flouting" of the Act. The Act contained four (4) categories of violations, de minimis; non-serious; serious, providing for mandatory penalty of up to $1,000; and wilful, permitting a penalty of up to $10,000. Serious was defined as violations "which create a substantial probability of death or serious harm"; wilful was undefined. In the event of a death, a wilful violation could result in imprisonment for up to six (6) months.

In vacating the penalty, this court noted that the "wilful" violation carried a penalty ten times heavier than a "serious" infraction, so that a strict construction of "wilful" should prevail:

> "We believe that a restrictive definition is appropriate here since otherwise there would be no distinction between a 'serious' offense and a 'wilful' one. The lack of demarcation would permit the agency to assess a higher penalty than that which is authorized for conduct defined as a 'serious' violation. A broad interpretation of 'willful' would disrupt the gradations of penalties and violations so carefully provided in the Act." *Irey, supra,* 519 F.2d at 1207.

Accord, Babcock & Wilcox Co. v. Occupational Safety, 622 F.2d 1160, 1165, 1167-8 (3d Cir. 1980); *see, Wehr v. Bur-*

roughs Corp., 619 F.2d 276, 282 (3d Cir. 1980), "merely negligent conduct is never wilful". See, *United States v. Consolidated Coal Company*, 504 F.2d 1330 (6th Cir. 1974).

Here, the Clean Water Act proscribes the "willful" or "negligent" discharge. Neither term is defined. Since violations found to be either willful or negligent permit the imposition of a fine of $25,000 and one (1) year's incarceration, it would appear, pursuant to *Irey*, that the terms have equivalent meanings. Therefore, mere negligence cannot support a Clean Water Act conviction.

Here, no grossly negligent conduct was alleged or proved. The jury was permitted to return a verdict of guilty based on simple negligence, a mere failure to use reasonable care. This the law forbids. Thus, the Clean Water Act convictions must be reversed and the matter remanded for a new trial.

VI. The Court Erroneously Instructed That Refuse Act Liability May Be Predicated Merely on Lanigan's Status as a Corporate Officer

The court instructed the jury that the standard of criminal law applicable to Mr. Lanigan was devoid of any mens rea, turning upon his position as a responsible corporate officer. Even though the Refuse Act excludes even a due care negligence standard, scienter must be proved. Were this not the case, the statute would be unconstitutional.

In *United States v. White Fuel Corporation*, 498 F.2d 619 (1st Cir. 1974), a corporate tank farm operator was convicted of Refuse Act violations for underground oil seepage into navigable waters. In rebuking White Fuel's argument that common law mens rea or negligence had to be proven under the Act, the court adumbrated:

> "As a corporate defendant like White Fuel cannot be imprisoned, we need not consider to what extent absolute liability would carry over to cases where incarceration is a real possibility." *White Fuel, supra*, 498 F.2d 623-4.

In reaching this conclusion, *White Fuel* relied upon the seminal case of *Commonwealth v. Koczwara, Pa.,* 155 A.2d 825 (1959), which held unconstitutional the imposition of a jail term upon a person convicted of violating a vicarious liability statute, reasoning:

> "It would be unthinkable to impose vicarious criminal responsibility in cases involving true crimes. Although to hold a principal criminally liable might possibly be an effective means of enforcing law and order, it would do violence to our more sophisticated modern-day concepts of justice. Liability for all true crimes, wherein an offense carries with it a jail sentence, must be based exclusively upon personal causation. . . . *Koczwara, supra,* 155 A.2d at 830.

Such holding is consistent with *Morissette v. United States,* 342 U.S. 246 (1952) which overturned a judgment of conviction[13] against an individual charged with conversion of government property pursuant to a statute which omitted any requirement of wrongful or criminal intent. In the cases which have upheld criminal statutes not specifically requiring intent, courts have done so either because: (a) the crime cannot be committed unknowingly [*e.g., United States v. Erne,* 576 F.2d 212 (9th Cir. 1978)]; (b) innocent violations cannot occur [*United States v. Ayo-Gonzalez,* 536 F.2d 652, 660 (5th Cir. 1976)]; (c) the commission of the act itself evidences clear criminal intent [*United States v. Flum,* 518 F.2d 39 (8th Cir. 1975); *United States v. Margraf,* 483 F.2d 708 (3d Cir. 1973)]; and (d) the wide range of available sanctions permits the shaping of the punishment to fit the crime [*Ayo-Gonzalez, supra*].

Here, of course, none of these four factors was present. Therefore, the *Morissette, White Fuel,* and *Koczwara* line of cases mandates that the Act as applied

13. The record is silent respecting whether a term of incarceration was imposed.

to Lanigan is unconstitutional, for violation of his Fifth Amendment due process rights.[14]

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14. *United States v. Park,* 421 U.S. 658 (1979) is not to the contrary. In reinstating convictions for causing adulterated food to travel in interstate commerce, *Park* found a series of communications between the Food and Drug Administration and Park, president of Acme Corporation, discussing rodent infestation of Acme's warehouses, and its palpable illegality. Such evidence here is sorely wanting. In addition, the *Park* statute touched the "lives and health of the people which, . . . are largely beyond self protection", so that no scienter was required. Here, had such concerns been at issue, RCRA charges or hazardous waste allegations would have ensued. Moreover, *Park* required that one charged must bear "a responsible share in the furtherance of the transaction which the statute outlaws". Here, Mr. Lanigan did not further any discharges; rather, he cleaned up a dismal open dump, remaining discharges being due to circumstances beyond his control. Thus, Mr. Lanigan could not prevent altogether the discharges claimed. He abided by his "duty to implement measures that will insure that violations will not occur", but was unable to achieve the impossible—elimination of all discharges. *Park,* indeed, recognized that no charge could stand where the defendant was "powerless" to prevent or correct the violations claimed. *Id.,* at 673. Indeed, *Park* rests on the following:

> "The record in this case reveals that the jury could not have failed to be aware that the main issue for determination was not respondent's position in the corporate hierarchy, but rather his accountability, because of the responsibility, and authority of his position, for the conditions which gave rise to the charges against him." *Id.,* at 675.

Moreover, in *United States v. Standard Oil Co.,* 384 U.S. 224, 230 (1966), holding that aviation fuel is refuse within the Refuse Act, this court refused to discuss "the quality of proof necessary to support a conviction nor the question as to what *scienter* requirement the Act imposes." This court there inferred that de minimis and/or negligent discharges might not support Refuse Act convictions.

VII. The Government Expert's Prejudicial Testimony Was Improperly Admitted

As set forth above, the government attempted to establish its claim of negligence through reliance on the testimony of one Gary Brown, who, testifying from a total absence of first-hand observations during the period in question, and relying on concededly erroneously assumptions, used a "water balance method" which led him to assume that the landfill had generated more leachate than it was capable of absorbing. The government seized upon this purported "excess leachate", through testimony and argument, contending that Mr. Lanigan's failure to haul 50,000 gallons of leachate per week to the borough of Bridgeport was therefore negligent. The suspect testimony should have been excluded, since the "water balance method" is inadmissible.

Mr. Brown testified that no court of law had ever accepted the water balance method. No evidence was ever introduced to the contrary. When a purported scientific test is the predicate for an expert's opinion, the government has some burden of establishing the reliability and accuracy of that test.[15] In *Punnett v. Carter*, 621 F.2d 578 (3d Cir. 1980), seeking relief for alleged mutagenic dangers stemming from nuclear testing, radiation dosage levels were pivotal to the plaintiffs claims. After discussing the expert's testimony, this Court affirmed the district court's conclusions not only that the factual assumptions relied upon by the expert were unsupported by the evidence, but also that his methodology was suspect. *See, Zenith Radio Corp. v. Matsushita Electric*, 505 F.Supp. 1313 (E.D. Pa. 1980). Since the government here failed to establish the predicates from which the

15. *United States v. Brady*, 595 F.2d 359 (6th Cir. 1979); *United States v. Brown*, 557 F.2d 541 (6th Cir. 1977); *United States v. Balloy*, 519 F.2d 403 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975); *United States v. Addison*, 498 F.2d 741 (D.C. Cir. 1974); *see, United States v. Kilgus*, 571 F.2d 508 (9th Cir. 1978).

methodology applied by the expert ought be deemed reliable, the court below committed plain error by permitting the expert to testify at all.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

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Date: March 28, 1983

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1315

UNITED STATES OF AMERICA

v.

LANIGAN, PAUL,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. No. 81-00297-01)
District Judge: Honorable Donald W. Van Artsdalen

Argued
January 6, 1983
Before: ALDISERT, GIBBONS and HIGGINBOTHAM,
Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that:

I. The repeated warrantless searches of the landfill violated Lanigan's fourth amendment rights;

(A.) The searches here conducted violate the fourth amendment due to the absence of a warrant or an equivalent guarantee of reasonableness;

(B.) The reasonableness requirement adheres to administrative searches;

II. The introduction of analyses of destroyed leachate samples violated Lanigan's rights to due process and effective assistance of counsel;

(A.) Destruction of evidence is suppression of evidence, violating the duty to preserve;

(B.) Appellant must have the opportunity to have his expert examine the items upon which the government's expert testimony is based;

III. Mr. Lanigan was not charged under the sole statute governing discharges from landfills;

(A.) The charges were based on inapplicable statutes;

(B.) Even had the RCRA not excluded prosecution for conduct here alleged to violate the Refuse and Clean Water Acts, case law would do so;

IV. The Clean Water Act does not proscribe the discharge of leachate from a landfill;

(A.) A landfill is not a point source;

(B.) The evidence failed to disclose any pollution of or an impact on any waters;

V. The Refuse Act does not proscribe landfill leachate discharges;

VI. The indictment and conviction are multiplictous;

VII. The court erroneously instructed that Clean Water Act liability could ensue from mere negligence;

VIII. The court erroneously instructed that Refuse Act liability may be predicated merely on Lanigan's status as a corporate officer;

(1) Scienter must be proved;

(2) Failure to require scienter renders the Refuse Act convictions unconstitutional;

IX. The government expert's prejudicial testimony was improperly admitted;

(A.) The "Water Balance Method" is inadmissible;

(B.) The "facts" seized upon by the expert were so concededly erroneous as to be inherently unreliable; and

(C.) Since Brown's testimony could not assist the jury in understanding evidence or determining a fact at issue, his testimony should have been excluded; it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

By THE COURT,

R. J. ALDISERT
Circuit Judge

Attest:
SALLY MRVOS
Sally Mrvos, Clerk

DATED: JAN 7 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1315

UNITED STATES OF AMERICA

v.

LANIGAN, PAUL,

Appellant

(E.D. Pa. Crim. No. 81-00297-01)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

ALDISERT
Circuit Judge

DATED: FEB - 3 1983

UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF PENNSYLVANIA

CR. 81-00297

UNITED STATES OF AMERICA

v.

PAUL LANIGAN

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, Peter J. Smith; Geoffrey L. Beauchamp, the defendant appeared in person on May 14, 1982 with counsel Richard A. Sprague, Esq.; Bruce L. Thall, Esq.

There being a verdict of guilty, defendant has been convicted as charged of the offenses of Discharge of a pollutant into a water of the United States without a permit; Discharge of refuse into a navigable water of the United States without a permit, in violation of Title 33, United States Code, Sections 407, 411, 1311(a), 1319(c)(1).

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

SENTENCE

On Count 16, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of ONE (1) YEAR, and shall pay a fine to the United States in the sum of TWENTY THOUSAND DOLLARS ($20,000.00).

On Count 17, the defendant is committed to the custody of the Attorney General or his authorized repre-

sentative for imprisonment for a term of ONE (1) YEAR to run concurrently with sentence imposed on Count 16. No fine is imposed on Count 17.

On Count 18, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of ONE (1) YEAR and shall pay a fine to the United States in the sum of TWENTY THOUSAND DOLLARS ($20,000.00). Sentence of imprisonment shall run concurrently with sentence imposed on Count 16.

On Count 19, imposition of sentence of imprisonment is suspended and the defendant is placed on probation for a period of THREE (3) YEARS to begin and commence on the termination of sentence of imprisonment imposed on this indictment and that of Criminal Action No. 81-298 before Judge Broderick. In addition, the defendant shall pay a fine to the United States in the sum of TWENTY THOUSAND DOLLARS ($20,000.00).

Fines imposed on Counts 16, 18 and 19 shall be paid on or before August 15, 1982.

On Count 20, imposition of sentence of imprisonment is suspended and the defendant is placed on probation for a period of THREE (3) YEARS to run concurrently with the period of probation imposed on Count 19. In addition, the defendant shall pay a fine to the United States in the sum of TWENTY THOUSAND DOLLARS ($20,000.00).

On Count 22, the defendant is committed to the custody of the Attorney General or his authorized representative for a term of ONE (1) YEAR to run concurrently with sentence of imprisonment imposed on Count 16, and shall pay a fine to the United States in the sum of TWENTY THOUSAND DOLLARS ($20,000.00).

On Count 23, the defendant is committed to the custody of the Attorney General or his authorized representative for a term of ONE (1) YEAR, to run concurrently with sentence of imprisonment imposed on Count 22. No fine is imposed on Count 23.

On Count 25, imposition of sentence of imprisonment is suspended and the defendant is placed on probation for a period of THREE (3) YEARS to begin and commence and run concurrently with the period of probation imposed on Count 19. In addition, the defendant shall pay a fine to the United States in the sum of TWENTY THOUSAND DOLLARS ($20,000.00).

Fines imposed on Counts 20, 22 and 25 shall be paid on or before November 15, 1982.

On Count 26, imposition of sentence of imprisonment is suspended and the defendant is placed on probation for a period of THREE (3) YEARS to run concurrently with the period of probation imposed on Count 25. No fine is imposed on Count 26.

On Count 27, imposition of sentence of imprisonment is suspended and the defendant is placed on probation for a period of THREE (3) YEARS to run concurrently with the period of probation imposed on Count 19. In addition, defendant shall pay a fine to the United States in the sum of TWENTY THOUSAND DOLLARS ($20,000.00).

On Count 28, imposition of sentence of imprisonment is suspended and the defendant is placed on probation for a period of THREE (3) YEARS to run concurrently with sentence of probation imposed on Count 27. No fine is imposed on Count 28.

On Count 29, the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of ONE (1) YEAR to run concurrently with sentence imposed on Count 16. Defendant shall pay a fine to the United States in the sum of TWENTY THOUSAND DOLLARS ($20,000.00).

On Count 30, imposition of sentence of imprisonment is suspended and the defendant placed on probation for a period of THREE (3) YEARS to run concurrently with the period of probation imposed on Count 19. In addition, the defendant shall pay a fine to the United States in the sum of TWENTY THOUSAND DOLLARS ($20,000.00).

On Count 31, the defendant is committed to the custody of the Attorney General or his authorized representative for a term of ONE (1) YEAR to run concurrently with sentence imposed on Count 16. In addition, defendant shall pay a fine to the United States in the sum of TWENTY THOUSAND DOLLARS ($20,000.00).

Fines on Counts 27, 29, 30 and 31 shall be paid on or before February 15, 1983. All sentences of imprisonment shall run concurrently with each other and with any sentence of imprisonment heretofore imposed on No. 81-0298 before Judge Broderick.

On Count 32, the defendant is committed to the custody of the Attorney General or his authorized representative for a term of ONE (1) YEAR to run concurrently with term of imprisonment imposed on Count 31. No fine is imposed on Count 32.

Fines on Counts 16, 18, 19, 20, 22, 25, 27, 29, 30 and 31 are cumulative and shall be paid on the dates set forth in the sentence. In the event there is a notice of appeal filed on or before any payment date and that appeal is still pending, in lieu of paying the fine, the defendant may post bond with good security for the unpaid balance of all fines then due. Upon failure to pay such fine or the posting of bond as above set forth, defendant shall surrender to the U. S. Marshal, U. S. Courthouse, Philadelphia, Pa. on the date such fine shall be paid for commitment to custody until such fine is paid or bond posted as above set forth.

SPECIAL CONDITIONS OF PROBATION

1. that he comply with all local, state and federal law;
2. that he comply with the rules and regulations of the PROBATION DEPARTMENT;
3. that he pay any and all fines imposed on the dates set forth in the sentence.

/s/ DONALD W. VANARTSDALEN
U. S. District Judge
Donald W. VanArtsdalen

May 17, 1982

Office-Supreme Court, U.S.
FILED
ALEXANDER L. STEVAS

No. 82-1635

In the Supreme Court of the United States

OCTOBER TERM, 1982

PAUL A. LANIGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly admitted evidence obtained by federal and state personnel either with petitioner's consent or from locations outside petitioner's landfill.

2. Whether the district court properly admitted analyses of leachate samples, nothwithstanding that the samples themselves were no longer available, when the deterioration of the samples would have prevented useful analysis by petitioner.

3. Whether the Resource Conservation and Recovery Act precludes criminal charges under the Federal Water Pollution Control Act and the Refuse Act for the discharge of pollutants from a landfill into navigable waters of the United States.

4. Whether the Federal Water Pollution Control Act and the Refuse Act were properly applied to petitioner where evidence showed that the leachate discharged from the landfill could adversely alter the biological integrity of the affected waterways.

5. Whether the district court properly instructed the jury that the defendant could be found guilty of violating the Federal Water Pollution Control Act on the basis of negligence.

6. Whether the district court properly instructed the jury that the defendant could be found guilty of violating the Refuse Act on the basis of his duties and responsibilities as a corporate officer involved in the operation of a landfill.

7. Whether the district court properly admitted the testimony of a government expert regarding a water balance analysis he performed on petitioner's landfill.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1635

PAUL A. LANIGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A3) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet App. A3) was entered on January 7, 1983. A petition for rehearing was denied on February 3, 1983 (Pet. App. A4). The petition for a writ of certiorari was filed on April 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a four-week jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on 10 counts under the Federal Water Pollution Control Act ("FWPCA" or "Clean Water Act"), 33 U.S.C. (& Supp. V) 1311(a) and 1319(c)(1), and five counts under the Refuse Act of 1899, 33 U.S.C. 407 and 411, in connection with the dis-

charge of the pollutant leachate[1] into navigable waters of the United States without a permit. Petitioner was sentenced to a one-year term of imprisonment, a three-year term of probation, and a fine of $200,000 (Pet. App. A5-A8). The court of appeals affirmed (*id.* at A1-A3).

1. The evidence at trial showed that in 1974 petitioner became the president, part owner, and chief operator of Moyer's Landfill, Inc., a Pennsylvania corporation engaged in the business of operating a waste dump in Montgomery County, Pennsylvania (2/8/82 Tr. 51-52; 2/12/82 Tr. 174-182; 2/22/82 Tr. 23).[2] The following year he applied to the Pennsylvania Department of Environmental Resources (DER) for a solid waste disposal permit allowing him to operate Moyer's Landfill as a solid waste disposal facility (2/12/82 Tr. 71-72) and for a water quality management permit (2/8/82 Tr. 43-78). The latter application included a leachate collection system at the landfill, which consisted of basins or impoundments to collect the leachate and pump it back into the landfill. The collection system was intended to prevent the discharge of leachate into two waterways adjacent to the landfill (*id.* at 57-71, 80-81, 102). A Pollution Incident Prevention Plan (PIPP) accompanying petitioner's application for a water quality management permit described the measures petitioner was required to take to prevent leachate discharges. The PIPP included adequate maintenance and daily inspections of the leachate management system. *Ibid.* In addition, petitioner also was required to haul leachate from the landfill to a nearby municipal wastewater treatment fa-

[1] Leachate is the contaminated liquid created by decomposition at a landfill and by rain water percolating through the landfill.

[2] "Tr.," "S-I," and "S-II," prefixed by a date, refer to the transcripts of the trial and the two suppression hearings, respectively.

cility, which allowed him to dispose of leachate at no cost (*id.* at 60, 76-77; 2/10/82 Tr. 139-143, 149).

In November 1976 petitioner received a water quality management permit and a solid waste disposal permit from DER (2/8/82 Tr. 76-90). The DER permits did not allow the discharge of leachate, and at no time did petitioner obtain a permit from the Environmental Protection Agency (EPA) allowing him to discharge any leachate (2/10/82 Tr. 139-143).

2a. At the pretrial hearing on petitioner's motion to suppress evidence obtained by EPA and DER personnel on visits to Moyer's Landfill and the vicinity, the government presented testimony showing that the collection basins near the west and south sides of the landfill were not located on the landfill property itself (12/14/81 S-I 1.3-1.9). Leachate samples and photographs obtained by EPA personnel from areas outside the landfill were offered to prove the leachate discharges alleged in various counts of the indictment (*id.* at 1.36-1.57, 1.111-1.114; 12/16/81 S-I 3.8-3.16; 2/22/82 Tr. 40-53). Evidence obtained by DER employees from such locations was offered to prove the leachate discharges alleged in other counts (12/15/81 S-I 2.4-2.7, 2.63-2.75). The district court ruled that all evidence obtained outside the landfill property would be admissible (2/4/82 S-II 2-5).

b. Evidence from the landfill property itself, including leachate samples, photographs, and statments by petitioner, was obtained by EPA employees on November 28, 1978, and January 9, 1980 (12/14/81 S-I 1.45-1.50, 1.112-1.113). Those leachate samples and photographs were not offered to prove a particular discharge alleged in the indictment, but rather were introduced to prove that leachate was a pollutant.

On the two occasions when EPA employees actually entered the landfill property, they properly identified themselves to petitioner and explained the purpose of

their visits (12/14/81 S-I 1.37-1.46, 1.114). When they asked petitioner for permission to enter the landfill premises, he readily agreed. *Ibid.* At no time was petitioner threatened or coerced in any way, and he did not object to the presence of the EPA representatives (*ibid.*; 12/16/81 S-I 3.56-3.59).

On January 9, 1980, petitioner was asked by an EPA engineer whether he hauled leachate from the landfill to the municipal sewage treatment plant. Petitioner responded that he never hauled any leachate because it was not necessary (12/14/81 S-I 1.47-1.49). Petitioner was in his office at the landfill during this conversation; he was not in custody (12/16/81 S-I 3.56-3.59) and did not show a hesitancy or unwillingness to speak with the EPA engineer (12/14/81 S-I 1.50).

In addition, two DER employees visited the landfill area in 1980 to make observations and take leachate samples from the landfill property itself (12/14/81 S-I 1.50; 2/8/82 Tr. 40; 2/10/82 Tr. 170). One of these DER employees explained that from February until July of 1980 he was responsible for periodically inspecting Moyer's Landfill and other facilities to determine if they were being operated in compliance with their DER permits (12/15/81 S-I 2.63-2.75). Each time the DER inspector visited Moyer's Landfill he properly identified himself and informed petitioner or one of petitioner's employees that he was there to conduct an inspection. *Ibid.* During those inspections the DER employee examined the landfill and took leachate samples when necessary. *Ibid.* Petitioner never objected to any of these inspections or attempted to keep the DER agent off the landfill premises (*id.* at 2.65). Two other DER solid waste specialists who had inspected the landfill also described how they conducted their inspections and stated that petitioner never objected to their inspections or tried to keep them off his propety (*id.* at 2.46-2.48, 2.95, 2.98-2.100).

At the conclusion of the suppression hearing the district court found that petitioner had consented to the visits by the EPA and DER personnel who entered the landfill property (2/4/82 S-II 6-12). The court also ruled that the defendant's statements were admissible. *Ibid.* Furthermore, the district court found that DER personnel were not required to obtain search warrants because Moyer's Landfill was subject to regular inspections by DER under state law and operated in an industry heavily regulated by state authorities. *Ibid.*

3. At trial the government presented the testimony of several witnesses, including private citizens, EPA personnel, and DER employees, who observed leachate discharges in 1978 and 1980 into the waters described in the indictment (2/8/82 Tr. 40-201; 2/9/82 Tr. 16-72, 178-215; 2/10/82 Tr. 16-136, 170; 2/22/82 Tr. 27-81). In addition to describing their observations, some of those witnesses also identified photographs of what they saw (2/8/82 Tr. 40, 173; 2/9/82 Tr. 26, 178; 2/10/82 Tr. 86, 99, 170; 2/22/82 Tr. 27). On some occasions the witnesses obtained samples of leachate that later were analyzed for their chemical content (2/8/82 Tr. 40; 2/10/82 Tr. 86, 99, 170).

The witnesses also described the poor condition of the leachate collection basin near one of the waterways. Pipes that were supposed to carry the leachate from the basin were often disconnected, and the pumps were frequently inoperable (2/8/82 Tr. 103; 2/9/82 Tr. 43; 2/22/82 Tr. 34, 43). A hole in the side of that basin in 1978 and 1980 allowed leachate to escape into a creek (2/10/82 Tr. 89; 2/22/82 Tr. 43-52).

Leachate discharges also were seen coming from the collection basin near the south side of the landfill into the other affected waterway. Leachate was observed flowing from a pipe that was not connected to this basin (2/9/82 Tr. 27-43). That pipe was found to be in the same position in both 1978 and 1980. *Ibid.*

In addition to the condition of the leachate collection basins, evidence of petitioner's negligence included his failure to haul any leachate to the municipal sewage treatment plant until March of 1980, when the federal investigation began (2/10/82 Tr. 147-151; 2/22/82 Tr. 28). Petitioner knew that he was supposed to haul leachate off-site and was aware that his consultant told EPA in 1977 and 1978 that leachate was being hauled to the municipal treatment plant (2/26/82 Tr. 103-118; 3/2/82 Tr. 50-64). Petitioner also allowed customers to dump sludges containing a substantial amount of liquid at the landfill, thus aggravating the leachate problem (2/22/82 Tr. 81-96, 150-178).

Evidence that leachate was a pollutant included the observations of witnesses who described the particular physical characteristics that distinguished it from the water in the affected waters (2/8/82 Tr. 103-110; 2/9/82 Tr. 39-50, 180-194; 2/10/82 Tr. 89-91, 176-180; 2/22/82 Tr. 29-52). Samples of leachate obtained from and around the leachate collections basins also were analyzed by laboratory personnel at EPA and DER and, on one occasion, by a private laboratory (2/8/82 Tr. 112-120, 175-184; 2/10/82 Tr. 86-112, 176-190; 2/12/82 Tr. 18-70, 91-169; 2/22/82 Tr. 8-22). A comparison of these analyses with EPA data showing the chemical components of the waterways involved indicated that leachate discharges would tend to create a "septic zone" in which aquatic life could not survive (*id.* at 97-127). Some leachate samples also contained "priority pollutants" as defined by EPA and other substances at levels normally found in sewage (2/12/82 Tr. 33-55).

To show the magnitude of the leachate problem at Moyer's Landfill the government presented the testimony of an environmental engineer, Gary Brown, whose areas of expertise included environmental engineering, landfill design, and leachate management (2/22/82 Tr. 16-21). He described the results of a water

balance study of Moyer's Landfill showing the total leachate and the excess leachate (*i.e.*, the amount of leachate exceeding that which could be contained by the landfill and its collection system) that were generated at the landfill in 1978, 1979, and 1980 (2/23/82 Tr. 16-167; 2/24/82 Tr. 11-106, 135-142). Moreover, using assumptions and facts proposed by the defense, Brown provided revised estimates. *Ibid.* Petitioner introduced expert testimony challenging the water balance study, and he testified extensively himself. After allowing the defense to cross-examine the environmental engineer about the basis and methodology of this study, the district court ruled that the results of his study were admissible under Fed. R. Evid. 702-704 (2/24/82 Tr. 127-131).

4. The court of appeals, in an order specifically enumerating each of the contentions raised by petitioner, affirmed the judgment of the district court (Pet. App. A1-A3).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. Accordingly, further review is not warranted.

1. Petitioner claims (Pet. 12-15) that the evidence obtained from the warrantless environmental inspections should have been suppressed. This claim is without merit.

The operation of a landfill is a business closely and pervasively regulated by the state and federal government. Indeed, all such facilities required to have a permit, including petitioner's, were subject to regular inspections by DER (12/14/81 S-I 1.143-1.144, 1.157-1.158), and petitioner was aware of that regulatory authority from the time he first became associated with the landfill (12/16/81 S-I 3.59). In addition, the FWPCA (33 U.S.C. 1318) specifically empowers EPA

to conduct warrantless inspections. In these circumstances, as in *Donovan* v. *Dewey*, 452 U.S. 594, 600 (1981), the state and federal legislatures have "reasonably determined that warrantless searches are necessary to further a regulatory scheme and the * * * [governmental] regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." See also *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271 (1973); *United States* v. *Biswell*, 406 U.S. 311, 316 (1972).

At all events, even apart from this regulatory authority, petitioner's motion to suppress was properly denied. Certain of the evidence at issue was obtained from locations outside the boundaries of Moyer's Landfill. Since petitioner had no reasonable expectation of privacy in these areas (see *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978)), he cannot seek suppression. See *Rawlings* v. *Kentucky*, 448 U.S. 98, 104-106 (1980). With respect to the evidence seized from the landfill property, petitioner allowed state and federal personnel to enter the premises and make their inspections, and the district court correctly found that such searches were consensual (2/4/82 S-II 6-12). See *United States* v. *Watson*, 423 U.S. 411, 424 (1976); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 225 (1973).

2. Petitioner also argues (Pet. 15-17) that the analyses of leachate samples should have been suppressed under *Brady* v. *Maryland*, 373 U.S. 83 (1963), because the samples themselves had not been preserved for his analysis.

The leachate samples in this case were discarded in accordance with normal operating procedures after they had been analyzed (2/4/82 S-II 17-18, 109-110). In addition, petitioner was sent copies of the EPA analyses prior to destruction of the samples (*id.* at 134-135).

Thus, no effort was made by the government to withhold evidence from petitioner or gain a tactical advantage over him.

Moreover, the natural chemical decomposition of these samples would have rendered them useless for petitioner to analyze. As explained in the testimony of EPA and DER laboratory supervisors, testing for the materials involved in this case would have to be done (depending upon the practicular material being analyzed) within periods of six hours to six months of sample collection (2/4/82 S-II 49, 53-59, 84, 110-118). Beyond those periods examination of the samples would not have accurately indicated their contents at the time they were collected (*id.* at 83-84). Therefore, when petitioner was indicted in October 1981, the samples—the last of which had been collected in early 1980—would have been far beyond the point at which their analyses could have furnished petitioner with any exculpatory evidence. And, of course, petitioner was allowed to cross-examine the experts who conducted the tests in order to probe their methodology and the reliability of their results.

Accordingly, the unavailability of the original samples was not a reason for suppressing the chemical analyses of those samples. See *United States* v. *Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir. 1979), cert. denied, 445 U.S. 917 (1980); *United States* v. *Picariello*, 568 F.2d 222, 227 (1st Cir. 1978); *United States* v. *Herndon*, 536 F.2d 1027, 1029 (5th Cir. 1976).

3. Petitioner next asserts (Pet. 17-21) that the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. (& Supp. V) 6901 *et seq.*, is the exclusive statute applicable to landfills and therefore preempts the FWPCA and the Refuse Act under which he was charged. This assertion is unfounded.

By its terms, the RCRA applies to the storage, transportation, treatment, and disposal of solid waste

(including hazardous waste). See, *e.g.*, 42 U.S.C. (& Supp. V) 6902, 6903, 6928(d). While "disposal" may include the discharge of a solid or hazardous waste into water, 42 U.S.C. 6904(3), the RCRA is not the only statute that encompasses such pollution, and it was not intended by Congress to displace other environmental regulatory statutes. To the contrary, 42 U.S.C. 6905(a) specifically provides that "[n]othing in this chapter [the RCRA] shall be construed to apply to * * * any activity or substance which is subject to the Federal Water Pollution Control Act."[3] In this case, the FWPCA and the Refuse Act clearly proscribe pollutant or refuse discharges into the navigable waters of the United States, and petitioner's activities—the discharge of the pollutant leachate into waterways without a permit—fit squarely within those proscriptions.[4]

Nor does the "rule of lenity" compel a different result. Petitioner has pointed to no "statutory ambiguity" that would support lenity here. *Lewis* v. *United States*, 445 U.S. 55, 65 (1980). Petitioner "has no constitutional right to elect which of two applicable federal statutes

[3] We also note, as petitioner acknowledges (Pet. 21 n.11), that the FWPCA (33 U.S.C. 1362(6)) defines "pollutant" to include "solid waste." This statutory definition would be rendered meaningless if, as petitioner urges, all aspects of solid waste are exclusively governed by the RCRA.

[4] Petitioner further contends (Pet. 18) that the FWPCA definition of "point source" (33 U.S.C. (Supp. V) 1362(14)) does not mention landfills. The listing of point sources upon which petitioner relies, however, is merely illustrative and, as Section 1362(14) expressly states, the statute "includ[es] but [is] not limited to" those examples. The leaky leachate collection system at Moyer's Landfill falls well within the generic definition of statutory source as "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." See *Sierra Club* v. *Abston Construction Co.*, 620 F.2d 41, 44-45 (5th Cir. 1980); *United States* v. *Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979).

shall be the basis of his indictment." *United States* v. *Batchelder*, 442 U.S. 114, 125 (1979).

4. Petitioner argues (Pet. 21-22) that the FWPCA requires a showing of adverse impact upon receiving waters. Actual damage to the environment, however, is not an element of an offense under 33 U.S.C. (& Supp. V) 1311(a) and 1319(c)(1). Rather, the FWPCA broadly prohibits the addition of pollutants to the waters of the United States. 33 U.S.C. 1362(12). Of course, for a substance to be a pollutant, it must have a tendency to harm or alter the integrity of a waterway. 33 U.S.C. 1362(19). In this case the government introduced expert testimony showing that the leachate discharges from Moyer's Landfill possessed substances in concentrations capable of adversely altering the biological integrity of the affected waterways (2/22/82 Tr. 97-127). Therefore, the evidence did show that leachate was a pollutant, and thus its discharge without a permit violated the FWPCA.[5]

5. Petitioner contends (Pet. 22-26) that "gross negligence—the functional equivalent of willfulness" (*id.* at 23)—is the minimum standard necessary to establish a violation of the FWPCA. The Act, however, imposes criminal liability upon "[a]ny person who *willfully or negligently* violates [its provisions]" (33 U.S.C. (& Supp. V) 1319(c); emphasis added). Furthermore, petitioner has pointed to nothing in the legislative history of the Act to indicate that the clear language of the statute implies a standard of gross negligence. And the

[5] Petitioner's argument regarding the Refuse Act also appears to turn on the necessity of showing harm (Pet. 22 n.12). That Act proscribes the discharge "from the shore * * * [of] any refuse matter of any kind or description whatever * * *." 33 U.S.C. 407. Thus, it makes no mention of a requirement that harm be shown. At all events, as discussed above, the government's evidence at trial was sufficient to demonstrate such harm.

fact that Congress failed to give a specific statutory definition to such a well-understood term as "negligen[ce]" certainly does not support petitioner's reading that the Act requires gross negligence.

Conceding that "[t]here are no federal cases construing the Clean Water Act precisely on point" (Pet. 23), petitioner seeks to rely (*id.* at 24-25) on *United States* v. *Oxford Royal Mushroom Products, Inc.*, 487 F. Supp. 852 (E.D. Pa. 1980). That case, however, does not suggest that gross negligence is required under the FWPCA; the court simply noted that willfullness may be imputed to a defendant because of grossly negligent conduct (487 F. Supp. at 857). More relevant here is the decision of the Third Circuit in *United States* v. *Frezzo Brothers, Inc.*, 602 F.2d 1123 (1979), cert. denied, 444 U.S. 1074 (1980), in which the court of appeals upheld a conviction under the FWPCA for the negligent discharge of pollutants. The court in *Frezzo* specifically noted that the defendant's abatement facilities were negligently maintained, and it accepted the government's theory of the case, as the jury had been instructed, that the Act is violated by a negligent discharge (602 F.2d at 1129-1130).

6. Contrary to petitioner's characterization (Pet. 26-28), the district court did not instruct the jury that they could convict petitioner under the Refuse Act based merely upon his position as a responsible corporate officer and without regard to mens rea. Rather, the district court specifically stated that the government had to prove beyond a reasonable doubt "not only that [petitioner] was an officer and responsible official in Moyer's Landfill Incorporated, but also that [he] failed to seek out and remedy the violations when they occurred, or failed to implement measures that would ensure that such violations would not occur" (3/3/82 Tr. 179). The district court also told the jury that they could not find the petitioner guilty of the Refuse Act vi-

olations unless they concluded that he was the responsible corporate officer and that the alleged discharges occurred through his willfullness or negligence. *Id.* at 182-183. Accordingly, there are no grounds for petitioner's contention that the instructions allowed him to be convicted because of his status as a corporate officer and regardless of his intent.[6]

7. Lastly, petitioner argues (Pet. 29-30) that the district court erred in admitting the "water balance" analysis of the government's expert, Gary Brown, because that methodology had not previously been accepted by a court. However, petitioner offers neither reason nor

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[6] We also note that petitioner had an affirmative duty to detect and prevent leachate discharges as set forth in the permit application (2/8/82 Tr. 68-71) and that he was actively involved in running the landfill and knew about the leachate problem (2/25/82 Tr. 16-19).

Because the district court did not give strict-liability instructions to the jury, it is unnecessary to consider petitioner's further argument that strict liability of an individual under the Refuse Act is unconstitutional. The lower federal courts have construed the Refuse Act to establish a public welfare or regulatory offense that imposes a strict-liability standard. See *United States* v. *White Fuel Corp.*, 498 F.2d 619, 622 (1st Cir. 1974); *United States* v. *Mackin Const. Co.*, 388 F. Supp. 478, 481 (D. Mass. 1975); *United States* v. *American Cyanamid Co.*, 354 F. Supp. 1202, 1205 (S.D.N.Y. 1973), aff'd, 480 F.2d 1132, 1133 (2d Cir. 1973); *United States* v. *Georgetown University*, 331 F. Supp. 69 (D.D.C. 1971); *United States* v. *United States Steel Corp.*, 328 F. Supp. 354 (N.D. Ind. 1970), aff'd, 482 F.2d 439 (7th Cir.), cert. denied, 414 U.S. 909 (1973); *United States* v. *Interlake Steel Corp.*, 297 F. Supp. 912, 914-915 (N.D. Ill. 1969). This Court has consistently upheld strict-liability statutes for regulatory offenses like that in the Refuse Act. See *United States* v. *Park*, 421 U.S. 658 (1975); *United States* v. *Freed*, 401 U.S. 601 (1971); *United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86, 91 (1964); *United States* v. *Dotterweich*, 320 U.S. 277 (1943). In light of the authorities construing the Refuse Act to be a strict-liability statute, the district court's instructions were unduly favorable to petitioner.

authority to support his view that the introduction of expert evidence is limited to that which has previously been used in court, and the Federal Rules of Evidence clearly do not require such a static and rigid test.

Regardless of whether the correct standard for the introduction of expert evidence centers on general acceptance or sufficient reliability,[7] Brown's trial testimony shows that the water balance method was admissible here. That method, developed in the early 1970s for EPA, is commonly used and relied upon by experts in Brown's field to determine the amount of leachate generated by landfills (2/23/82 Tr. 29-30). In several states the water balance method is required as part of landfill designs to justify the size of a leachate treatment or management system. *Ibid.* With respect to the methodology he employed in his study of Moyer's Landfill, Brown testified that he analyzed all of the factors that are commonly considered when using the water balance method (2/23/82 Tr. 38-91). Accordingly, the district

[7] Prior to the adoption of Fed. R. Evid. 702, the proponent of expert testimony was required to show that the expert's technique or scientific theory was generally accepted in his field. The issue whether that requirement is retained by Rule 702 has evenly divided the six circuits that have considered it. See 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 702[03] at 702-16 (1982). The Sixth, Ninth, and District of Columbia Circuits still require proof of general acceptance. See, *e.g.*, *United States* v. *Hendershot*, 614 F.2d 648 (9th Cir. 1980); *United States* v. *Brady*, 595 F.2d 359 (6th Cir.), cert. denied, 444 U.S. 862 (1979); *United States* v. *McDaniel*, 538 F.2d 408 (D.C. Cir. 1976). The Second, Fourth, and Eighth Circuits, on the other hand, have adopted a more flexible approach requiring the trial judge to find only that the scientific technique or principle is sufficiently reliable. See, *e.g.*, *United States* v. *Luschen*, 614 F.2d 1164, 1169 n.3 (8th Cir. 1980), cert. denied, 446 U.S. 939 (1981); *United States* v. *Williams*, 583 F.2d 1194 (2d Cir. 1978), cert. denied, 439 U.S. 1117 (1979); *United States* v. *Baller*, 519 F.2d 463, 466 (4th Cir.), cert. denied, 423 U.S. 1019 (1975).

court did not err in admitting Brown's expert testimony.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 82-1635

IN THE

Supreme Court of the United States

October Term, 1982

PAUL A. LANIGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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ARGUMENT

Pursuant to Rule 22.5 of the United States Supreme Court Rules, Petitioner hereby submits his Reply Brief in support of his Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

1. The United States argues (Brief at 11) that it need not prove harm to the environment in order to sustain a Refuse Act or Clean Water Act conviction and that the government's evidence demonstrated environmental harm resulting from to the operation of Moyer's Landfill. The law requiring that the government establish a measurable harm to the environment in order to meet its burden under the Clean Water Act and Refuse Act has been set forth in the cert petition. The evidence negating any measurable harm to the environment is discussed herein.

The government relied upon the testimony of its witness, Dr. Jane Massey, in order to attempt to prove diminished water quality in Skippack Creek. It made no attempt to prove diminished water quality in Eagle Stream, the other waterway allegedly "polluted" by Moyer's Landfill. Dr. Massey compared "storet" data for Skippack Creek for the periods 1950 to 1978, and 1978 to 1980 (the periods for which E.P.A. maintained and established such data). Storet data was obtained both immediately upstream and downstream from Moyer's. Dr. Massey testified that the downstream samples for certain pollutants were greater in the period from 1978 to 1980 than they had been from 1950 to 1978. Based upon the worsening of the downstream water quality, the government contended that Moyer's necessarily polluted Skippack Creek.

What Massey failed to do, however, was to compare the storet data for the upstream and downstream stations, from 1950 to 1978 and from 1978 to 1980. Dr. John Keenan, a Professor of Environmental Engineering at the University of Pennsylvania, did this analysis based on Dr. Massey's data. He testified, without contradiction, that there was no evidence whatsoever that the landfill had any adverse impact on the Skippack Creek because the downstream data was not different from the upstream

data in each time period compared. "Well, when one looks at the [EPA] data, one cannot see a difference between the upstream point and the downstream point, and therefore you cannot make any determination about changes in the [water] quality". By measuring only the downstream samples, Massey did pick up increases in certain pollutants; however, those pollutants obviously did not come from Moyer's Landfill. Had their source been the landfill, then the upstream samples would not have reflected the same pollutants as the downstream samples for each of the periods reflected in the storet analysis.

Donald Knorr, a DER employee, took upstream and downstream Skippack Creek samples on May 12, 1980. He reluctantly conceded that he found "no significant difference" between these analyses. The government introduced no evidence of any adverse impact on any water nor did it seek to introduce any analysis of Skippack Creek which it had taken because they demonstrated no adverse impact on the water. The reason for this seeming anomoly is clear. Although landfill leachate in containment vessels may have contained heavy concentrations of perameters which worsen water quality, the quantity of leachate, if any, reaching the water was de minimus and/or the source of leachate reaching the waters was not the containment vessels themselves. Thus, when Dr. Massey testified that despite no measurable impact on the Skippack from the landfill, there would nonetheless be a "specific zone" due to higher concentrations of metals which would "create a zone where normal acquatic life can no longer exist", she assumed substantial leachate discharges. She conceded, however, that she did not know the quality or quantity, if any, of leachate actually entering the Skippack.

In fact, a government witness testified that on May 24, 1980 — a date subsequent to all but one of the indictment charges before the jury — he and his son were *fishing* in the Skippack where the alleged leachate discharges had been occurring for a period of years. Thus, obviously no "septic zone" existed, and no worsening of the quality of any water was established.

2. The United States contends that since certain collection basins near the west and south side of the landfill were not lo-

cated on landfill property [Br.3], and/or since Petitioner allegedly consented to warrantless searches and seizures of leachate from these collection basins, Petitioner's motion to suppress the fruits of those searches was properly denied. The United States also argues that since landfills are pervasively regulated, no warrant of any kind need have been secured so that Petitioner's motion to suppress was properly denied. The government's arguments are factually and legally insufficient. Conceding no warrant, and in absence of any evidence suggesting a random, neutral administrative inspection scheme, the government suggests that the mere fact of regulation is sufficient to circumvent the Fourth Amendment. Obviously, were this the law, then *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967); and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) would have been decided differently, and *Donovan's v. Dewey's fulcrum* — "the only real issue before us is whether the statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant", *Donovan v. Dewey*, 101 S.Ct. 2530, 2540 — would be mere surplusage. The Federal Clean Water Act parrots the language found infirm by this Court in *Barlow's*, which permits the administrator a "right of entry" exercisable at "reasonable times" to copy records and sample effluents, 33 U.S. §1318(a)(B)(i) and (ii), but only such records and effluents which the *operator* is required to maintain or sample. No such requirement of sampling was ever imposed on Petitioner. Therefore, the samples seized were taken in violation of the Act itself, even were its inspection program able to pass constitutional muster.

The Refuse Act does not purport to permit warrantless entries for enforcement purposes. The *Pennsylvania Solid Waste Act*, 35 P.S. §6001 *et seq.*, and the *Pennsylvania Clean Stream Act*, 35 P.S. §691.1 *et seq.*, contain absolutely no provisions which even imply the bounds, if any, of an inspection program nor a regularized right of entry, nor the right to remove samples.

Therefore, the United States is forced to rely upon "consent" to justify the warrantless searches. Respecting "consent",

the record is uncontradicted in the following regards: (a) for numerous entries, no consent from Mr. Lanigan, or any other person, was either sought or obtained; (b) no one advised Mr. Lanigan of the right to refuse entry or to preclude the taking of samples, absent a warrant; (c) no one advised Mr. Lanigan of his right to have samples seized by the government divided so that he could have the samples tested independently; (d) no consideration was given by the government to obtaining a search or administrative warrant; (e) no one advised anyone that samples, observations or photographs could be used in a criminal proceeding; and (f) no one wished Mr. Lanigan to know the true purpose of the searches; the pursuit of citizen complaints, and government investigations about landfill operations, with a view towards potential criminal prosecution.

Indeed, DER Inspector Thomas Sheehan testified that Mr. Lanigan never objected to agents on the premises because "we both thought I had a right to go on". Since all parties assumed a right of entry and seizure, and no suggestions of future criminal proceedings or uses of these materials were raised either directly or indirectly by any governmental agents through their statements, credentials, or absence of uniforms, no consent can possibly be claimed to here exist. Any consent claimed to amount to a relinquishment of a Fourth Amendment right must be voluntary; *i.e.*, freely and intelligently given:

> "When a prosecutor seeks to rely upon consent to justify a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiesence to a claim of lawful authority." *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968).

See also, United States v. Jones, 641 F.2d 425, 429 (6th Cir. 1981) ("the burden of proving a valid consent was on the government, and, as we have repeatedly held, this burden required 'clear and positive' proof that the consent was uncontaminated by duress, coercion or trickery.") Here the United States proved no more than periodic acquiescence to a claim of lawful authority, which acquiescence was based on withholding information

from Petitioner. Thus, no consent was obtained for any warrantless entry.

Given the fact that no one was even consulted respecting numerous entries, and the facts as set forth above, the government now argues that the suppression motions were properly denied because some of the basins were not on landfill property. It is correct that at a suppression hearing on December 14, 1981, testimony was elicited from a government witness to the effect that collection basins at the west and south sides of the landfill might not be located on Moyer's property. What the United States has failed to disclose is that this question arose in the context of whether observations by citizens who may have trespassed onto Moyer's property could be admitted into evidence at trial. Obviously, that question is irrelevant to the Fourth Amendment issues here raised. Indeed, the land on which the landfill sat was never owned by Moyer's; Moyer's was merely a corporation which owned the landfill business, the property on which it sat being owned by third parties. However, whether located on or off the geographic boundaries of the land owned by these third parties, it is uncontroverted that the basins themselves were the property of Moyer's. Therefore, Mr. Lanigan as corporate owner of the basins may properly raise these claims, whose determination hinges on traditional Fourth Amendment analysis. *Rakas v. Illinois*, 439 U.S. 128, 138-39, 147 (1978), *reh. denied*, 439 U.S. 1122 (1979); *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *Salvucci v. Jones*, 100 S.Ct. 2547 (1980).

Here, regardless of the actual property boundaries, Moyer's, EPA, DER, and the citizenry assumed both Moyer's proprietary interest in and privacy rights respecting the basins; therefore, the warrantless searches and seizures were unconstitutional.

3. The United States relies on "the poor condition of the leachate collection basin system" in order to establish negligence on the part of Petitioner. [Br. 5] The government also seeks to impose criminal liability on Mr. Lanigan through observations of persons on precious few days as to the existence of such "poor condition", in an effort to establish his negligence.

The evidence, however, is overwhelming that Mr. Lanigan did, in fact, direct daily that the first order of business was to assure that the collection basin system was inspected and maintained. One Chapman Redman was specifically delegated the daily task to inspect all pipes, lines and basins both on and off the landfill, which task he stated he performed. In connection with the maintenance of the system, however, vandalism was a major and continuous problem. Acts of vandalism testified to included pipes being shot, broken and pulled apart; pumps being turned off and switches broken; and the setting of suspicious fires. Some of these acts of vandalism, contemporaneously reported to the police, were reflected in police reports, which reports the court refused to admit into evidence.

Thus, the record discloses a daily diligence on the part of Mr. Lanigan, directing his employees to maintain the integrity of the leachate collection system. The government relies on "a hole in the side of [a] basin in 1978 and 1980 [which allowed leachate to escape into a creek]." There was no such hole in 1978.

4. The government also relies upon Petitioner allowing "customers to dump sludges containing a substantial amount of liquid at the landfill, thus aggravating the leachate problem." [Br. 6]. The government has failed to advise this Court that, as the evidence at trial reflected, every customer who dumped sludges containing substantial liquid at the landfill, did so only after obtaining prior authorization and approval from DER, the agency charged with monitoring and assuring compliance with state and federal pollution laws.

5. In connection with its argument that "gross negligence — the functional equivalent of willfulness" — need not be established in order to sustain a Clean Water Act conviction, the United States relies on the case of *United States v. Frezzo Bros., Inc.*, 602 F.2d 1123 (1979), *cert. denied*, 444 U.S. 1074 (1980). In *Frezzo*, the Third Circuit Court of Appeals did uphold a conviction under the Clean Water Act for negligent discharge of pollutants. *Frezzo*, however, never discussed much less decided whether gross negligence was required or whether gross negligence had been proved by the government in that case. Thus, *Frezzo* is of little solace to the United States.

6. In his cert petition, Petitioner established how the government attempted to establish its claim of negligence through reliance on the testimony of one Gary Brown, who, testifying from a total absence of first-hand observations during the period in question, and relying on concededly erroneous assumptions, used a "water balance method" which led him to assume that the landfill had generated more leachate than it was capable of absorbing. The government seized upon this purported "excess leachate" through testimony and argument, contending that Mr. Lanigan's failure to haul 50,000 gallons of leachate per week to the borough of Bridgeport, resulted in leachate discharges from the landfill of "excess leachate", and established negligence. In the cert petition, Petitioner has established how the existence of "excess leachate" is a figment of Mr. Brown's imagination, unsupported by eyewitness observations of both residents and regulatory personnel of DER and the EPA.

Petitioner has argued that all Brown's testimony should have been excluded since the "water balance method" is inadmissable. Petitioner established that the record is clear that no court of law had accepted the water balance method and that, when a purported scientific test is the predicate for an expert's opinion, the government has at least some burden of establishing the reliability and accuracy of the test. This the United States failed to do.

The United States has responded by misconstruing Petitioner's argument, stating that Petitioner argues that Brown's testimony should have been excluded merely because the methodology has not previously been accepted by a court. [Br. 13]. Petitioner has argued no such thing. All that Petitioner has contended is that where methodology has not previously been determined by a court to be reliable, the government must establish by clear and convincing evidence that the scientific technique is reliable. This task was not undertaken by the government in connection with its prosecution of Petitioner herein. Therefore, Brown's testimony should not have been admitted. Had such testimony not been admitted, the jury might not have found negligence, or even a violation under the Refuse Act. Therefore, it is submitted not only that the trial court errone-

ously permitted Mr. Brown to testify, but also that the testimony was a significant factor in connection with the verdicts of guilty which were returned. This averment is supported by the jury determination. Brown testified that excess leachate would have occurred in 1980. Mr. Lanigan was acquitted of all charges eminating from allegations of Clean Water Act and Refuse Act violations in 1978, being convicted on only some charges in the year 1980.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for a Writ of Certiorari, a Writ of Certiorari should issue to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,
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